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No. 87-697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD ROTHENBERG,

Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY, LLC CORPORATION, LN PARTNERSHIP, NL INDUSTRIES, INC., ROBERT A. BICKS, NICHOLAS F. BRADY, MAURICE F. GRANVILLE, WILLIAM A. MARQUARD, JAMES F. MATHIS, THEODORE C. ROGERS, IAN M. ROSS, HERMAN J. SCHMIDT, ROBERT G. SCHWARTZ, DONALD V. SEIBERT, ELEANOR B. SHELDON AND THOMAS P. STAFFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMALGAMATED SUGAR RESPONDENTS IN OPPOSITION

JAMES K. LEADER
TOWNLEY & UPDIKE
Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

THOMAS A. GOTTSCHALK
(Counsel of Record)
FREDERICK M. ROWE
DANIEL F. ATTRIDGE
JEFFREY A. ROSEN
YOSEF J. RIEMER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for the Amalgamated Sugar Respondents

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

This case presents the unexceptional application of settled state corporate law that the actions of a board of directors are binding on the corporation and shareholders in the absence of any breach of the directors' fiduciary duty. The directors here lost a court challenge to their action in adopting a discriminatory antitakeover device. The petitioner, a shareholder who had notice of the litigation and chose not to intervene, waited until the District Court ruled against the directors. Petitioner then brought a state court suit on the precise same issue to have the directors' action declared lawful. Before any trial and any ruling on the merits in the state court litigation, the District Court granted an injunction to preserve and effectuate its prior judgment from relitigation of the same claim resolved in that judgment.

In assessing the petition, the question is whether these circumstances present an issue warranting review by this Court where there is no challenge to the finding of both courts below that petitioner did seek to relitigate precisely the same claim previously resolved in the federal judgment, where both courts found that petitioner had no interest in the earlier litigation that was not vigorously represented by the directors, and where federal court precedent uniformly supports the rejection of each of petitioner's specific legal challenges.

STATEMENT PURSUANT TO RULE 28.1

This brief in opposition to Richard Rothenberg's petition for a writ of certiorari is filed on behalf of the Amalgamated Sugar respondents: The Amalgamated Sugar Company, LLC Corporation and LN Partnership. Effective March 10, 1987, Valhi, Inc. succeeded by corporate merger to the interests of the Amalgamated Sugar respondents.

Valhi's corporate parent is Valhi Group, Inc. At the present time, Valhi's non-wholly-owned subsidiaries or direct affiliates are Contran Corporation, National City Lines, Inc., Dixie Products, Inc. and NL Industries, Inc. Valhi is also indirectly affiliated with those companies' subsidiaries or affiliates, none of which is publicly traded with the exception of Keystone Consolidated Industries, Inc., Sybra, Inc. and T.I.M.E.-DC, Inc.

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BRIEF FOR THE AMALGAMATED SUGAR RESPONDENTS IN OPPOSITION

Rothenberg's petition for a writ of certiorari raises no issue meriting this Court's attention. The unanimous Second Circuit panel properly applied well-established principles of law to affirm the District Court's carefully documented factual findings. Both Courts held that an injunction against petitioner's state court relitigation was a permissible exercise of the District Court's authority to preserve and effectuate its prior judgment in-

validating the discriminatory Poison Pill antitakeover device that petitioner seeks to revive. The rulings of the Courts below neither conflict with the decisions of this Court or any other federal court nor present any significant federal questions which call for this Court to grant certiorari. The petition, therefore, should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case distorts the record and relies on innuendo and irrelevancies to distract attention from the Second Circuit's unanimous affirmance of the District Court's meticulous factual findings. An accurate, unbiased statement of the case is found in the Second Circuit's opinion. *See The Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 636-38 (2d Cir. 1987).

As both Courts below found, the Amalgamated Sugar respondents brought a diversity suit in 1986 in the Southern District of New York against NL Industries, Inc. and its directors to invalidate the directors' adoption of a discriminatory "Poison Pill" antitakeover device. 825 F.2d at 637; *The Amalgamated Sugar Co. v. NL Industries, Inc.*, 644 F. Supp. 1229, 1230-33 (S.D.N.Y. 1986). A fierce litigation battle ensued, and the District Court held that the Poison Pill was "an unlawful device" and "*ultra vires* as a matter of New Jersey Business Corporation law." 644 F. Supp. at 1234. Based upon the recommendations of experienced independent legal and financial advisors, NL's directors then negotiated an arms-length settlement with Amalgamated, which provided, *inter alia*, for a permanent injunction against the Poison Pill. 825 F.2d at 637-38; *The Amalgamated Sugar Co. v. NL Industries, Inc.*, 667 F. Supp. 87, 90, 92 (S.D.N.Y. 1987). The District Court approved and entered that final consent judgment. 825 F.2d at 638.

Petitioner Rothenberg, an NL shareholder, had notice of and chose not to intervene in the vigorously litigated suit. 825 F.2d at 637; 667 F. Supp. at 95. His interests were well represented in both the litigation itself and the settlement thereof by NL's directors, whom even petitioner concedes committed no breach of fiduciary duty. 825 F.2d at 640; 667 F. Supp. at 95-96. But as soon as the District Court struck down the Poison Pill, petitioner raced into New Jersey state court with a new suit seeking to nullify the federal court judgment. 825 F.2d at 637. When petitioner continued to shop for another opinion in state court, the District Court exercised its authority under 28 U.S.C. § 2283 to protect and effectuate its judgment by enjoining him from further duplicative litigation. 667 F. Supp. at 96. The Second Circuit unanimously affirmed that injunction. 825 F.2d at 636.

REASONS FOR DENYING THE PETITION

Review by this Court is "not a matter of right" but "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. Petitioner does not identify any issue meriting this Court's attention. Instead, referencing the Second Circuit opinion only three times in a twenty-five page petition, he reprints almost verbatim a diatribe presented below. Both the District Court and the Second Circuit carefully considered every objection petitioner raises and rejected them as without foundation in fact and contrary to well-settled federal precedent. This Court should not disturb those rulings.

As the Second Circuit found, both the District Court's 1986 decision to reach the illegality of the Poison Pill and its 1987 injunction were fully consistent with abstention principles. Petitioner's challenge to those findings is contrary to decisions of this Court and the overriding federal interest in protecting the integrity and efficacy of federal judgments. *See* Part I.A, *infra*. The

injunction was also consistent with "the sound administration of justice" since it was entered only after the state court refused to rule on the res judicata effect of the 1986 decision. *See* Part I.B, *infra*.

Similarly, petitioner has no valid basis for disputing the Second Circuit's fact-specific holding that he was bound by the judgment against his corporate fiduciaries—NL's directors. First, accepted res judicata doctrine mandates that a shareholder be bound where, as here, a corporation's directors represent the shareholder in defending a corporate act. *See* Part II.A, *infra*. Second, there was overwhelming evidence that the directors vigorously protected petitioner's interests in the 1986 litigation—a fact confirmed by petitioner's disclaimer of any breach of fiduciary duty by the directors. *See* Part II.B, *infra*. Finally, the great weight of the evidence supported the finding below that the litigants had adverse legal interests at the time of the consent judgment. *See* Part II.C, *infra*.

I. THE SECOND CIRCUIT'S UNANIMOUS AFFIRMANCE OF THE DISTRICT COURT'S INJUNCTION IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The Second Circuit Properly Found That The District Court Exercised Its Statutory Authority To Enjoin Relitigation Of The Precise Claim Previously Adjudicated.

Although petitioner contends that the District Court erred in the initial federal litigation in 1986 by reaching the invalidity of the Poison Pill, that issue is not appropriately raised by petitioner who never appealed that judgment. In any event, the District Court's exercise of its diversity jurisdiction was well grounded in this Court's decisions. In *Williams v. Green Bay & W.R.R.*, 326 U.S. 549 (1946), this Court held that where, as

here, diversity jurisdiction is invoked, federal courts may not decline to exercise it solely because of an asserted difficulty in ascertaining state corporation law:

> The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it. . . . So long as diversity jurisdiction remains, the parties may not be remitted to a state court merely because of the difficulty of making a decision in the federal court.

Id. at 553-54.[1] Moreover, the predicate for petitioner's abstention theory—the supposedly "unsettled" nature of state law—is absent here because New Jersey law was plain as to the invalidity of NL's Poison Pill.[2]

Nor was abstention required in 1987 when Amalgamated sought an injunction against petitioner's reliti-

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[1] *See also Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943) (no congressional policy to exclude cases from "jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine"); *McNeese v. Board of Educ. for Comm. Unit Sch. Dist. 187*, 373 U.S. 668, 673 n.5 (1963) ("difficulties and perplexities of state law are no reason for referral of the problem to the state court").

[2] *See Amalgamated*, 644 F. Supp. at 1234-37 (citing decisions forbidding discrimination among shareholders in payment of dividends and striking down discriminatory antitakeover devices as *ultra vires* under New Jersey law).

Petitioner's reliance on this Court's decision in *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987), is similarly misplaced. That decision addressed whether an Indiana statute was preempted by federal law or violative of the Commerce Clause. The Court's reference to the traditional role of state corporation law in regulating corporations in no way detracts from the power of federal courts to apply that state law (as the District Court did here) when diversity jurisdiction is invoked.

gation. It was petitioner's attempt to relitigate a federal judgment in state court that raised the specter of inconsistent judgments and fomented conflict between federal and state courts. To prevent such clashes, Congress authorized federal courts to enjoin relitigation in state courts where needed to preserve and effectuate federal judgments. *See* 28 U.S.C. § 2283 (1982). Any rule which nullifies that power solely because the relitigation presents a question of state law "would destroy diversity jurisdiction." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 92 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

Petitioner's abstention argument is also defeated by his concession that federal, not state, law controls the res judicata effect of the prior federal judgment. (P.B. 20.) The proceedings below represent the converse of the situation in *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1527 (1987). There, the Court held that a federal injunction barring a successful state court litigant from enforcing its final state court judgment intruded impermissibly on the state's special interest in the execution of its judgments. In contrast here, federal interests override any state interest in deciding the res judicata effect of a prior federal judgment.

B. Amalgamated's Application For Injunctive Relief Was Timely And In No Way Contrary To The Sound Administration Of Justice.

Amalgamated never had "two bites at the apple" on the res judicata effect of the prior federal judgment. Rather, Amalgamated sought to enjoin the state court relitigation following the state court's express refusal at the preliminary pleading stage to address the res judicata issue and to decide it one way or the other.[3] Federal

[3] Promptly after being sued in New Jersey, Amalgamated moved for summary judgment *solely* on res judicata grounds. (App. 44-45.) The state court denied the motion without prejudice and

courts have consistently held that applications for injunctions against relitigation are timely where presented and granted before any final state court adjudication of res judicata issues.[4]

This Court's decision in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), is fully consistent with the finding below that Amalgamated's application for an injunction was timely. In *Parsons Steel*, no injunction against relitigation was sought until after a state court jury verdict on the underlying merits. *Id.* at 522. Because the state proceedings had reached that advanced stage, this Court held that federal courts were required to consider the res judicata effect of the state court verdict, consistent with the "last in time" rule. But a litigant cannot be precluded from seeking a federal injunction unless and until the "state court has *finally* rejected a claim of res judicata." *Id.* at 524 (emphasis supplied). In this case, the state court had not reached the merits and no definite ruling on the res judicata issue had been rendered. (App. 107.) Thus *Parsons Steel* did not preclude an injunction. *See Bechtel Petroleum, Inc. v. Webster*, 796 F.2d 252, 253 n.3 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2455 (1987).[5]

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deferred final consideration of the issue until an eventual trial on the merits. (App. 107.)

[4] *See Silcox v. United Trucking Service, Inc.*, 687 F.2d 848, 853 (6th Cir. 1982) (injunction affirmed although not sought "until after the state court had indicated that it would not afford the prior federal judgment the res judicata effect to which it was entitled"); *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45, 48 (7th Cir. 1976) (rejecting argument that by filing dispositive motion in state court, party seeking injunction had waived or was estopped from seeking injunction from federal court), *cert. denied*, 429 U.S. 1096 (1977).

[5] Moreover, even if the res judicata effect of the state court's decision not to resolve the res judicata effect of the federal judgment need be considered, neither federal nor state law would give res judicata effect to such an "avowedly tentative" ruling. *See, e.g.*,

Petitioner is really arguing that having been sued in state court, Amalgamated was forever after barred from asking a federal court to enjoin relitigation. But it would serve no interest of federalism or the "sound administration of justice" to hold that pleadings setting up the defense of a prior federal judgment in the early stages of a state court proceeding bar a federal court's exercise of its statutory authority to protect its judgments. On the contrary, such a rule would require vastly expanded use of injunctions—an intrusive remedy at best—at the outset of every state court action presenting a threat of relitigation. As the District Court explained, the sensitive relations of federal and state courts made it "entirely appropriate and in the interest of comity" for Amalgamated to raise and present its res judicata defense in a pretrial context. *Amalgamated*, 667 F. Supp. at 92.

II. HOLDING THE NL SHAREHOLDER BOUND BY THE PRIOR JUDGMENT AGAINST HIS CORPORATION AND ITS DIRECTORS WAS FULLY CONSISTENT WITH SETTLED FEDERAL PRECEDENT.

The Second Circuit considered and rejected as without merit petitioner's arguments that despite his status as an NL shareholder, he remains free to relitigate a claim identical to that decided against his corporate fiduciaries—the NL directors. *Amalgamated*, 825 F.2d at 639-42. That ruling fully comports with decisions of this Court and other federal courts of appeals, as well as state courts, and is fully supported by the circumstances of this case.

Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1530 n.3 (9th Cir. 1985); *Central R.R. Co. v. Neeld*, 26 N.J. 172, 139 A.2d 110, 113, *cert. denied*, 357 U.S. 928 (1958); Restatement (Second) of Judgments § 13 comment g (1980).

A. Under The Circumstances Of This Case, It Was Appropriate To Hold The NL Shareholder Bound By The Court's Prior Judgment Invalidating Action Taken By NL's Board Of Directors.

The Second Circuit emphasized four circumstances in holding that res judicata barred petitioner's effort to relitigate the prior federal judgment invalidating the NL Board of Directors' adoption of the Poison Pill: (1) the NL Board acted in its "fiduciary capacity" in defending the initial litigation; (2) petitioner alleged no breach of fiduciary duty in conducting that litigation; (3) the directors "vigorously represented" the shareholders' interests in validating the legality of a corporate act ostensibly taken to benefit the shareholders; and (4) petitioner sought to relitigate the precise claim at issue in the prior proceedings. *Amalgamated*, 825 F.2d at 640-41.

The decision below is consistent with decisions of this Court [6] and the lower federal courts [7] as well as numerous

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[6] *See, e.g., Marin v. Augedahl*, 247 U.S. 142, 150 (1918) ("'a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member'") (citation omitted); *Selig v. Hamilton*, 234 U.S. 652, 660 (1914) (shareholder "must be deemed, by virtue of his relation to the corporation . . . to be represented by it in the proceeding"); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 644 (1900) ("'[E]very stockholder in a corporation is so far privy in interest in an action against the corporation that he is bound by the judgment against it.'") (citation omitted); *Hawkins v. Glenn*, 131 U.S. 319, 329 (1889) ("[T]he stockholder is bound by a decree of a court of equity against the corporation in [the] enforcement of a corporate duty, although [the stockholder was] not a party [to the previous action] as an individual.").

[7] *Green v. ABC, Inc.*, 572 F.2d 628, 630 (8th Cir. 1978) ("[T]he individual plaintiffs were in privity with [the corporation] for claim preclusion purposes."); *BGW Associates, Inc. v. Valley Broadcasting Co.*, 532 F. Supp. 1115, 1118 (S.D.N.Y. 1982) ("shareholders of [the corporation] are barred from relitigating the issues that were or should have been presented to the federal court [in prior action against corporation] under res judicata because they are privies").

state courts [8] holding that shareholders may not relitigate the validity of corporate actions in such circumstances. It also comports with settled federal precedent precluding nonparties from relitigating matters adjudicated against their fiduciary representatives [9] or against parties who "adequately represented" the nonparties' interests.[10] The decision below reflects the central principle of corporate governance: management of the business and affairs of

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[8] *See, e.g., Scarbourough v. Briggs*, 81 Cal. App. 2d 161, 183 P.2d 683, 686 (1947) ("[S]hareholders of a corporation are in privity with it and, in the absence of fraud, are bound by all judgments rendered against the corporation."); *Ballas v. Cladis*, 167 Colo. 248, 447 P.2d 224, 228 (1968) ("[A] decree against a corporation is binding on its stockholders because there is a privity between a corporation and its stockholders."), *cert. denied*, 395 U.S. 921 (1969); *Solimine v. Hollander*, 128 N.J. Eq. 228, 16 A.2d 203, 238 (Ch. 1940) ("In the absence of fraud stockholders of a company are bound by the decision of litigation in which their company sues or defends."); *Mathews v. American Tobacco Co.*, 130 N.J. Eq. 470, 23 A.2d 301, 311 (Ch. 1941), *aff'd*, 135 N.J. Eq. 11, 37 A.2d 99 (1944); *Willoughby v. Chicago Junction Rys. & Union Stockyards Co.*, 50 N.J. Eq. 656, 25 A. 277, 280 (Ch. 1892) ("[E]very member of a corporation is so far privy in interest in a suit against the corporation that he is bound by the judgment against it."); *Horn v. Bennett*, 253 App. Div. 630, 3 N.Y.S.2d 525, 527 (1938) ("A judgment against the corporation, unless impeached, is conclusive against the corporation and its stockholders."); *Bush v. Eastern Uniform Co.*, 356 Pa. 298, 51 A.2d 731, 732 (1947) ("A shareholder is deemed privy to proceedings, touching the corporation of which he is a member.).

[9] *See, e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974); *Chicago R.I. & P. Ry. v. Schendel*, 270 U.S. 611, 620 (1926); *Kerrison v. Stewart*, 93 U.S. 155, 160 (1876); *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984); *Union Ins. Society v. William Gluckin & Co.*, 353 F.2d 946, 953 (2d Cir. 1965).

[10] *See, e.g., Grossman v. Axelrod*, 646 F.2d 768, 769 (2d Cir. 1981); *Ellentuck v. Klein*, 570 F.2d 414, 425-26 (2d Cir. 1978); *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977); *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 98 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

any corporation, including the defense or settlement of litigation challenging corporate conduct, is entrusted to its board of directors.[11]

Petitioner's broad theory that res judicata never binds stockholders is without precedential support. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), described by petitioner as "conclusive," did not present any res judicata issue. Instead, *Hazeltine* addressed whether personal jurisdiction over a subsidiary also afforded personal jurisdiction over a parent corporation. As for the lower court opinions cited by petitioner, those cases all hold shareholders to be in privity with their corporations notwithstanding *dicta* adverting to the possibility shareholders might not be bound in some unspecified situations.[12]

Petitioner also seeks to avoid the binding effect of the final federal judgment against NL by positing, for the first time, that a "class" of shareholders he purports to represent might include individuals who sold their stock just prior to that judgment. (P.B. 22-23.)[13] But having

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[11] *See, e.g., United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263 (1916); *Schein v. Caesar's World, Inc.*, 491 F.2d 17, 20 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974); *United States v. E.I. DuPont de Nemours & Co.*, 13 F.R.D. 487, 489 (N.D. Ill. 1953); H. Henn & J. Alexander, *Law of Corporations* § 242, at 662 (3d ed. 1983).

[12] *See In re Teltronics Services, Inc.*, 762 F.2d 185, 191 (2d Cir. 1985) (judgment against "corporation bars later litigation on the same cause of action" by shareholder); *Dudley v. Smith*, 504 F.2d 979, 982-83 (5th Cir. 1974) (stockholder held "in privity with his corporation"); *Ritchie v. Landau*, 475 F.2d 151, 155 n.2 (2d Cir. 1973) (stockholder may invoke protection of judgment as he would be bound by judgment). The insignificance of the *dicta* is underscored by the fact that all the supporting authorities cited also hold shareholders to be bound by privity.

[13] The state court never reached the question of class certification. (App. 109.)

failed to make that argument below, petitioner may not do so now. *See, e.g., United States v. Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970); *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958). In any event, the new argument proves nothing. The NL directors represented and bound all shareholders who had any interest in validating the Poison Pill regardless of when they acquired or sold their ownership rights.

B. Termination Of The Appeal Pursuant To A Settlement By The NL Directors Did Not Render Their Representation Inadequate.

Petitioner's argument that the NL directors' decision to accede to a consent judgment rather than pursue an appeal somehow rendered them inadequate representatives of NL's shareholders raises, at most, a factual issue, *see Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975), and wholly ignores the factual findings below.

In unanimously affirming the District Court's findings that NL's directors had been "vigorous" representatives of NL's shareholders and had conducted the litigation "directly in the interests of [NL] shareholders other than Amalgamated," 667 F. Supp. at 95, the Second Circuit noted that: (a) the directors were "faced with a substantial likelihood of ultimate defeat" after the District Court's ruling that the Poison Pill was unlawful; and (b) continuation of the litigation would have "seriously impeded" the conduct of NL's business affairs. *Amalgamated*, 825 F.2d at 637-38, 640. The Second Circuit concluded that there was "every indication in the record that the settlement represented [the NL directors'] informed judgment that the interests of NL and its shareholders would be served best by settlement." *Id.* at 640.

Petitioner failed below to make any showing that these findings were clearly erroneous. There, as here, he re-

sorts to innuendo, asserting that the settlement was somehow the product of an effort by NL's management to obtain "substantial benefits for themselves and . . . the preservation of their jobs." (P.B. 12-13.) To the contrary, the record establishes that the settlement decision was made by the NL directors. All but one of the thirteen directors was independent of NL's management and the settlement agreement "did not provide any benefit to the independent NL directors." *Amalgamated*, 825 F.2d at 637. In fact, the settlement provided that the directors were apt to be replaced, rather than continue. *Id.* In short, there is no record support for petitioner's challenge to the settlement process; there plainly is no significant issue presented worthy of this Court's attention.[14]

C. The Second Circuit Properly Applied This Court's Decisions To Hold That The District Court Retained Jurisdiction To Enter The Final Consent Judgment.

This Court has held that federal courts retain jurisdiction to enter a consent judgment after the parties agree to settle their dispute,[15] where as here, (1) the litigants

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[14] Petitioner's citation of the Fifth Circuit's decision in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), does not aid his argument. *Gonzales* did not hold that a decision not to appeal *per se* establishes inadequate representation. Rather, that decision turned on a class representative's desertion of other class members when he alone obtained all the relief sought. *Gonzales*, 474 F.2d at 75-76; *see also Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978) (*Gonzales* establishes that "the attorney [for a class] is not free to advocate the interests of the named plaintiffs alone"), *aff'd*, 444 U.S. 472 (1980). *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983), also has no bearing on this case as it involves no issue of a failure to appeal. Indeed, petitioner's counsel so acknowledged in the District Court: "[L]et's forget the *Delta* case." (App. 521.)

[15] *Pope v. United States*, 323 U.S. 1, 12 (1944); *see also SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984).

have adverse legal interests[16] and (2) a judicial decision would affect the plaintiffs' rights.[17] Professing no disagreement with this standard, petitioner raises at most a factual challenge to the findings below that these requirements were satisfied here.

First, the adversity requirement was clearly satisfied. Although Amalgamated acquired 51% of NL's stock on August 8, 1986, Amalgamated was powerless to obtain control by replacing a majority of NL's directors for two years. *Amalgamated*, 667 F. Supp. at 89. The settlement was considered and approved on August 13th by the incumbent NL directors, whose legal interests were plainly adverse to Amalgamated. *Id.*[18]

Second, at the time judgment was entered, "Amalgamated had a legally cognizable interest in securing

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[16] *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 382-83 (1980); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

[17] *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396-97 (1980); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

[18] No change of control actually occurred until August 25th, eleven days *after* entry of the final judgment. (App. 468-69.) Petitioner seeks to avoid that fact by alleging that Amalgamated acquired the "immediate right to name a majority of NL's directors" before entry of the consent judgment. (P.B. 24.) But his reliance on settlement documents demonstrates that any such right could only have been the product of the settlement negotiated by adverse parties and embodied in the consent judgment.

Moreover, the documents petitioner relies upon do not establish Amalgamated had any such right prior to the entry of the consent judgment on August 14. (*See* App. 275.) The August 8, 1986 date on the first document cited refers not to the date of each event discussed therein but rather to the "[d]ate of [the] earliest event reported"—Amalgamated's purchase of additional stock. (App. 274.) The second document cited barred Amalgamated's appointment of any directors until nine of NL's thirteen incumbent directors had resigned and specifies that those resignations were not required until "August 18, 1986." (App. 292.)

protection against . . . the potentially devastating financial effects" of the Poison Pill. *Amalgamated*, 825 F.2d at 640. Had the litigation been terminated without enjoining the Pill, Amalgamated would have been faced with the possibility of enormous discriminatory dilutions of its equity and voting power.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES K. LEADER
TOWNLEY & UPDIKE
Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

THOMAS A. GOTTSCHALK
(Counsel of Record)
FREDERICK M. ROWE
DANIEL F. ATTRIDGE
JEFFREY A. ROSEN
YOSEF J. RIEMER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for the Amalgamated Sugar Respondents

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